

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition of Mid-Rivers Telephone Cooperative,)	WC Docket No. 02-78
Inc. for Order Declaring it to be an Incumbent)	FCC 04-252
Local Exchange Carrier in Terry, Montana)	
Pursuant to Section 251(h)(2))	

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
INITIAL COMMENTS**

The National Telecommunications Cooperative Association (NTCA)¹ hereby files its initial comments in response to the Federal Communications Commission (Commission or FCC) Notice of Propose Rulemaking (NPRM) seeking comment on the petition of Mid-Rivers Telephone Cooperative, Inc. (Mid-Rivers) for an order declaring Mid-Rivers an incumbent local exchange carrier (ILEC) in the Terry, Montana telephone exchange pursuant to Section 251(h)(2) of the Act.² NTCA urges the Commission to grant the petition and declare Mid-Rivers an ILEC in the Terry, Montana exchange.

I. INTRODUCTION

On November 15, 2004, the Commission released its NPRM seeking comment on whether Mid-Rivers has satisfied the three-prong test in Section 251(h)(2) to be declared an ILEC in the telephone exchange service area in Terry, Montana. Pursuant to Section 251(h)(2), the FCC may provide for the treatment of a local exchange carrier (LEC) as an ILEC if the

¹ NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents 560 rural rate-of-return regulated incumbent local exchange carriers (ILECs). All of its members are full service local exchange carriers, and many members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

² *In the Matter of Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring it to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2)*, WC Docket No. 02-78, FCC 04-252, Notice of Proposed Rulemaking, (NPRM) (rel. Nov. 15, 2004).

LEC: (1) occupies a market position comparable to the incumbent, in this case Qwest; (2) has “substantially replaced” an ILEC; and (3) the reclassification as an ILEC is consistent with “the public interest, convenience, and necessity.”³ Based on the record evidence in this proceeding, Mid-Rivers has provided a clear and convincing showing that it has passed the three-prong test for being treated as an ILEC under Section 251(h)(2), and thus the Commission should grant the Mid-Rivers petition and declare Mid-Rivers an ILEC serving the Terry, Montana exchange.

II. IT IS APPROPRIATE TO DEFINE THE TERRY EXCHANGE AS THE RELEVANT AREA.

The Commission asks whether it may consider the Terry exchange as the relevant “area” for the purposes of section 251(h)(2)(A). The Commission should focus its analysis on the question of whether the carrier seeking ILEC status is providing local exchange service rather than on whether it has replaced all of the prior ILEC’s service. Use of the local exchange is consistent with the statute’s focus on the “local exchange carrier.” Treatment of the Terry exchange as the relevant area for performing the analysis in 251(h)(2)(A) and (B) is consistent with the remainder of Section 251. The “successor and assign” provision in the definition of ILEC, 251(h)(1)(B)(ii), for example, defines an ILEC as an assign or successor of a member of the exchange carrier association qualifying for ILEC status under 251(h)(B)(1)(i). The statute is silent on the subject of the relevant area and does not appear to contemplate that a successor or assign must acquire the entire service area of a qualifying exchange carrier association member to be defined as an ILEC. Since the thrust of Section 251 is to impose greater burdens on ILECs, it is unlikely that Congress contemplated that carriers defined in 251(h)(B)(1)(i) and (ii) could

³ See Mid-Rivers Telephone Cooperative, Inc., *Petition for Order Declaring Mid-Rivers Telephone Cooperative Inc. an Incumbent Local Exchange Carrier in Terry, Montana*, WC Docket No. 02-78, p. 1 (filed Feb. 5, 2002) (Mid-Rivers Petition).

together defeat ILEC status by arranging for the sell off of portions of NECA member service areas to different entities.

The Commission can separately address its other concerns about the impact on universal service and access charges while accepting the exchange area as the relevant area for purposes of its analysis. The universal service concerns raised here are being addressed in a separate proceeding where NTCA and others have argued that support should be based on each carrier's cost.⁴ Access charges, as well, are being universally and comprehensively addressed in the Commission's Intercarrier Compensation docket.⁵

III. MID-RIVERS HAS SHOWN THAT IT OCCUPIES A "COMPARABLE" MARKET POSITION AND HAS "SUBSTANTIALLY REPLACED" QWEST AS THE INCUMBENT LOCAL EXCHANGE CARRIER IN THE TERRY, MONTANA EXCHANGE.

NTCA agrees with the Commission's tentative conclusion that Mid-Rivers satisfies the first two prongs of the statutory test in Section 251 (h)(2). Since 1997, Mid-Rivers has constructed outside network plant facilities in the Terry, Montana exchange and has provided modern, reliable services including voice, broadband, and other communications services to consumers living and working in Terry, Montana. As a result, Mid-Rivers occupies a comparable market position and has substantially replaced Qwest as the incumbent local exchange service provider by virtue of serving practically the entire Terry subscriber base with its superior customer and quality of service.⁶ Mid-Rivers currently provides local exchange service and other telecommunications services to 97 percent of the 317 residential lines and 118 business lines in the Terry, Montana exchange. This clearly and convincingly demonstrates that

⁴ See Initial Comments of NTCA, CC Docket No. 96-45, FCC 04J-2, p.2 (filed October 15, 2004).

⁵ See *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92.

⁶ See *Ex Parte* Letter to FCC Chairman Michael K. Powell from David Cosson, Counsel to Mid-Rivers Telephone Cooperative, Inc., WC Docket No. 02-78, dated April 24, 2004, Attachment p. 1.

Mid-Rivers' occupies a "market position comparable" to Qwest and has "substantially replaced" Qwest as the ILEC in the Terry exchange.⁷

IV. MID-RIVERS HAS SHOWN THAT TREATMENT AS AN ILEC IS CONSISTENT WITH THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY.

The Commission seeks comment on whether the Mid-Rivers' request for classification as an ILEC is consistent with the public interest, convenience and necessity.⁸ The Commission appears concerned about the fact that if it grants the petition, Mid-Rivers would qualify as a "rural telephone company" in the Terry exchange and thus be exempt from regulation under Section 251(c) of the Act.⁹ NTCA points out that Mid-Rivers' can lose its rural exemption. Section 251(f) of the Act exempts certain rural telephone companies from the interconnection and unbundling requirements imposed on ILECs under Section 251 of the Act. Section 251(f), however, also allows a state commission to terminate the rural exemption if the state commission receives a bona fide request from a competing carrier for interconnection, services, or network elements with the ILEC, and the state commission determines the request is: (1) not unduly economically burdensome, (2) technically feasible, and (3) consistent Section 254 of the Act. Thus, if a state commission determines based on a bona fide request that the requirements contained in Section 251(f) are met, a state commission may remove a rural ILEC's rural exemption in an effort to better serve the local competition provisions of the Act. The rural exemption would therefore not prevent the development of competition as intended by Congress. The local competition provisions in the Act would be duly served by classifying Mid-Rivers as an ILEC.

⁷ *Id.*

⁸ NPRM ¶ 10.

⁹ NPRM ¶ 10, footnote 30.

The Commission also indicates that if it grants the petition, the amount of high-cost universal service support available to the area could increase because Mid-Rivers would qualify to receive support under the rural ILEC universal service fund (USF) mechanisms.¹⁰ The Commission further indicates that this may lead to a fund increase by changing the amount of support available for service to particular areas.¹¹ The Commission notes that if Mid-Rivers purchased the Terry exchange from Qwest, Mid-Rivers universal service support would be frozen at the level of support prior to the transfer.¹²

The Commission should not use the potential increase in high-cost support or access charges as an excuse to further delay or deny granting the Mid-Rivers petition. The Commission in a separate proceeding in CC Docket 96-45 and CC Docket 01-92 is addressing the size of the fund and increases in high cost. There are no grounds in this narrow proceeding for an independent assessment that grant of the petition will significantly and adversely affect the fund in a manner inconsistent with the public interest. It would be novel for the Commission to deny the petition on this basis while it continues to grant dozens of wireless competitive eligible telecommunications carrier (CETC) designations in rural ILEC service areas. It has granted many of these over the last two years knowing that with each CETC designation the USF would increase. The potential increase in the universal service fund has never once resulted in the Commission finding that a CETC designation is not in the public interest.

There is also no basis for the Commission to treat Mid-Rivers as a purchaser of the Terry exchange. Mid-Rivers has not purchased the Terry exchange from Qwest, therefore the parent trap and safety valve rules do not apply.

¹⁰ NPRM, ¶ 11.

¹¹ *Id.*

¹² *Id.*

V. CONCLUSION

Based on the above, Mid-Rivers has provided a clear and convincing showing that it has passed the three-prong test for being classified and treated as an incumbent under Section 251(h)(2). Thus, the Commission should grant the petition and declare Mid-Rivers an ILEC serving the Terry, Montana exchange.

Respectfully submitted,

NATIONAL TELECOMMUNICATIONS
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December 30, 2004

CERTIFICATE OF SERVICE

I, Rita H. Bolden, certify that a copy of the foregoing Initial Comments of the National Telecommunications Cooperative Association in WC 02-78, FCC 04-252 was served on this 30th day of December 2004 by first-class, U.S. Mail, postage prepaid, to the following persons:

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